EXHIBIT S

STATE OF SOUTH DAKOTA) IN CIRCUIT COURT
: ss.
COUNTY OF PENNINGTON) SEVENTH JUDICIAL DISTRICT

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LINDA CORNELISON, on behalf of herself and all others similarly situated,

Plaintiff,

vs.

VISA USA, INC., MASTERCARD INTERNATIONAL, INC.,

Defendant.

COPY

Motion Hearing
Case No. CIV03-1350

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PROCEEDINGS: The above-entitled matter commenced on the 28th day of September, 2004, at the Pennington County Courthouse, Rapid City, South Dakota.

BEFORE: The Honorable Janine M. Kern

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APPEARANCES:

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THE COURT: This is the time and place set for motion hearing in File Civil C03-1350, in the matter of Linda Cornelison, on behalf of herself and all others simply situated, plaintiffs, versus Visa USA, Inc. and Mastercard International, Inc.

If the Plaintiffs would begin by noting their appearance with local counsel first, please.

MR. EISLAND: Aaron Eisland, local counsel for Plaintiff.

MR. MITBY: Steve Mitby, your Honor, for Plaintiff. I will spell my last name, M-I-T-B-Y.

THE COURT: Thank you.

MR. LEBRUN: Gene LeBrun for Visa USA, Inc.

MR. ERLANDSON: Good afternoon, Greg Erlandson, local counsel on behalf of Mastercard.

MR. BOMSE: Stephen Bomse, B-O-M-S-E, for Visa.

MS. CROWLEY: Good afternoon, Patricia Crowley on behalf of Mastercard International, Incorporated.

THE COURT: Thank you. Mr. Bushnell (sic) and Mr. Erlandson, you have filed a motion to dismiss. I would like to begin with you and then I'll hear from Plaintiff's counsel.

I'm sorry, Mr. LeBrun.

MR. LEBRUN: Mr. Bromse will make the argument.

MR. BOMSE: Your Honor, I don't know if you

have any preference as to whether or not counsel stands when they address you or remain seated.

THE COURT: Either. Whatever you are most comfortable with. You can sit, you can stand.

MR. BOMSE: I'm actually going to stand up and test my eye sight here, but if I find my notes are swimming, I may change my mind.

Thank you, your Honor. It's very nice of the Court to set aside this time to hear us on this motion. As your Honor may be aware, from the papers, this is one of a number of what we call follow-on lawsuits which were filed in various states around the country, approximately 20 of them, in the wake of the settlement of a federal antitrust class action against my client, Visa and Mastercard. And the way we have been doing this in the various states, is Mastercard and Visa have divided up the arguments so I will be speaking this afternoon principally on behalf of both defendants. If the Court --

THE COURT: That's fine.

MR. BOMSE: In those cases we have argued a number of these motions previously and five of them have been decided already.

We referenced three in our papers, New York, Michigan and North Dakota, where the courts granted our

motions to dismiss essentially on the same grounds that we urge here. There is a fourth case that was decided subsequent to the last briefs which is Minnesota. It's a case called Gordon Gutzwiller and the Court has received that opinion which we sent in subsequently.

There is -- in addition, a fifth case, which, like the other four, also dismissed the antitrust claims, although in that case it was on entirely unrelated grounds. Obviously, we hope that we'll be able to persuade your Honor that those cases were correctly decided and that your Honor will elect to follow them.

We believe that while it is clear that South Dakota, like the other states in which these cases are pending, has decided that it does not wish to bar all indirect purchaser cases. That in no means grants a license for any and all indirect purchases or cases without regard to any standing limitations. We believe rather that the intention of the legislature was that in appropriate cases indirect purchaser cases be permitted, but that there still needs to be an analysis of standing under what the Supreme Court and various other courts have referred to as the analytically distinct requirement of standing. Analytically distinct, that is from the Illinois Brick Rule which is a specific federal policy based rule.

Now, just to put this matter in some context factually. We, of course, accept the allegations of Plaintiff's complaint for these purposes. They claim that Visa and Mastercard have rules which improperly tie the acceptance of Visa and Mastercards credit cards to Visa and Mastercards debit cards. They claim that, as a result of that, merchants ended up paying more to accept Visa debit cards then they otherwise would have. To that extent, these cases and the federal case are entirely common. That was that description I just gave you was a description of the claim in the federal case.

In the federal case, that was where it stopped. That is, the merchants claimed that they ended up paying too much money and as your Honor again may know, if you've had an opportunity to read the papers, we settled those cases on the eve of trial facing a 100 billion dollar damage exposure paying three billion dollars seemed like the better part of valor.

Now, in these cases, we regard as important and we find depositively a different additional step because the claim now made is that once those merchants pay too much, as it's alleged, to accept Visa and Mastercard debit cards, they, in turn, raise the prices of everything they sold to every consumer and regardless of how that consumer paid for those things. Thus we don't have a

claim here that involves the purchase of our service, our debit card service, which is offered to merchants. We don't even have a claim, based upon the resale of a product containing that service as an ingredient. It's hard -- hard to imagine litigation. Particularly what that means, it's clear that it doesn't include the claims here because in fact we know that according to the plaintiff's theory and their complaint, it doesn't matter whether a debit card in fact entered into the resale transaction.

In that sense, these claims are what we have referred to in our papers as overhead claims. It is, as if some cost of doing business, we gave an example of a telephone service where the telephone prices went up to merchants and the theory would be the merchants then raised the price of spaghetti or tennis rackets or television sets because they paid too much for telephone service. Or to use an example that the Plaintiffs seem to be fond of. They say this is a tax and a tax is in effect a form of overhead. It's a cost of doing business. And the question that we confront here today is, can you bring a claim like that merely because South Dakota, which generally follows federal law, and there is abundant law that says that they are expected to follow antitrust law merely because in this case the South

Dakota legislature has decided that we are going to a limited extent to depart from federal law by allowing indirect purchaser cases to be brought.

They say that the language of the statute begins and ends. The inquiry although, as I'll explain in a few minutes, even they don't really believe that because they don't argue that there is no standing limitation. They just want you to adopt a different one. Something they call target area and I'll come back to that.

But their basic position is when Illinois Brick was disavowed in South Dakota, that was the end of standing. We say that that is not so. Any more than it was found to be so in New York or Michigan or North Dakota or Minnesota and any more than courts in those states in other cases not involving the Visa and Mastercard have simply abandoned the standing inquiry because they are Illinois Brick repealer states.

THE COURT: Well, how would you respond to the Plaintiff's alternative suggestion to the Court that if the Court is persuaded by your argument, that they should be allowed to redefine the class to include only South Dakota residents who purchase goods or services using Visa or Mastercard branded debit cards?

MR. BOMSE: Well, I would say this. I would say that it is a class definition which makes no sense in

terms of the allegations. It's an attempt really in a -- I don't want to be projective in suggesting it's cute because that's not exactly what it is. But it is attempting to connect two things that have no connection. Let me explain what I mean. The theory that they have, because that's -- we know it from the class that they have originally defined here and everywhere is a class in which the presence or absence of a debit card has nothing to do with the offense. So we know, as we start out, that there is no causation here that involves a debit card otherwise that would have been the class that they would have defined.

Their theory inside is in the same way as my telephone or tax or janitorial service example, somebody pays too much, they end up passing the cost along in all products. So that the presence or absence of a debit card is therefore unrelated to the theory of violation. To give the Court an example, I'll go back to my telephone example. Let us say that the theory was that there was a conspiracy to raise telephone prices. The claim is brought. Say prices of everything were raised to every purchaser in the State of South Dakota. Motion to dismiss is made. They say, well, let us redefine our class as people who bought things over the telephone as opposed to coming into the store. It seems to me we

would fairly say there, as we ought to fairly say here, hey, wait a minute, that makes no sense. The existence of a telephone sale as opposed to an in-person sale has nothing to do with the theory of what was wrong anymore than it does in this case.

So it seems to me that their attempt ought to fail because it really doesn't have anything to do with the case. I could in fact go further, but I think I would be outside of the pleadings. But when we were arguing this case with one of counsel's partners in Washington, DC, the Judge said, you know -- because the same argument was made by the same lawyers -- the Judge said, "you know, I understand the theory, but isn't it somehow backwards to say that it's the debit card people who somehow ought to have the claim as opposed to anybody else? After all, the debit card people are the people who presumably got the benefit of having a debit card. They wanted to use the debit card."

Now, I don't think you need to go that far here. I think you merely need to find that there is no relationship between the offense and the proposed redefined class in order to say that that kind of a redefinition isn't appropriate. Again, while this Court, of course, is going to make up its own mind, this issue was briefed specifically in Michigan on a motion for

reconsideration which the Court denied as having raised no new arguments.

Now, your Honor, if we go back to the question of why we say standing rules still ought to apply here. It seems to me, that we go back to the fact that we do have a difference between Illinois Brick and standing rules. As I said, analytically distinct. And courts have recognized that one needs to still look at whether a claim is so remote, whether the damages claimed are so speculative and complicated in proof that we really are beyond the bounds of what is sensible even in a place where indirect purchaser cases are allowed.

As I say, in none of the states where we have been successful so far has the law been any different. We have here not a claim that somebody's bought a product that indirectly passed through a chain of distribution, we don't have a claim that this is a product that became an ingredient in something that passed through a chain of distribution. We have a claim here that is in effect for every single product purchased by anybody not even in a way that involves this product. This is, as we say, a non-purchaser case just as the Court found in Michigan and then more recently in Minnesota and North Dakota.

You really don't have an assault, Plaintiffs arguments to the contrary notwithstanding. You don't

have an assault here on indirect purchaser cases. You have here a sensible application of some limits to claims which really can't be proven and if we think about what it is that's being alleged here and what it is the Court is being asked to embark upon if this case goes forward, I think that that becomes clear. I don't know what it is that Ms. Cornelison does or doesn't do herself in terms of purchase, but if I think of myself on a Saturday morning going out to do the errands, you go to the gas station, you fill up your tank and you pay perhaps with cash. You go to the grocery store, maybe you buy 20 or 30 different items. You might write a check there. You go pickup the dry cleaning, maybe you go and buy yourself a new tennis racket, at night maybe you go out to dinner. One day one person we now have to know what is it that happened with respect to the dry cleaning and the corn flakes and the gasoline and the meal in the restaurant and the tennis racket. We have to know what it is that happened to the price of those goods because of some tiny little fraction. Because, to begin with, the price that merchant pays for card services is on the order of one to one and a half percent, if it's a debit card. By the time you spread -- decide what portion of that is, quote, "an overcharge", and you then spread out that overcharge out among all of the purchases, you can't be talking

about more than let's say ten cents on a hundred dollar purchase.

And yet the theory is that for all of these various things, somehow prices were affected in a way that adversely affected Ms. Cornelison and any other consumer in a class to be certified in this state. And it doesn't seem to me that once you think of it in those terms, that the rhetoric which the courts have been prompted to use in Michigan and in New York and in Minnesota is really hyperbolic at all when they say these claims are far beyond the capacity of a court to try. So speculative that no expert could possibly deal with them and therefore not of a kind that are capable of being adjudicated under the antitrust laws whether you allow indirect purchaser claims or you don't.

I really do think that in some ways the Minnesota Court, which is the most recent and I think the most elaborate, pretty well incapsulated what we would have to say to your Honor in the summary of its ruling. The Court said that, "despite the broad language of the Minnesota antitrust law as set forth in that statute and the broad language contained in a case in that court, called Philip Morris, not every person claiming some remote or tangential injury from an antitrust violation can maintain a suit under the Minnesota antitrust laws."

The Judge then said "a literal reading of the Minnesota statute is broad enough to encompass any harm it can be attributed either directly or indirectly to the consequences of an antitrust violation." That being, of course, exactly the argument that the plaintiffs make. They say, "even though" -- I'm sorry, the Court in Minnesota said, "even though the language of the statute is clear and unambiguous, the Court must interpret the statute in a manner which will not lead to an illogical or absurd result."

"In this case, the Plaintiff's proposed interpretation would lead to a decision that would provide a remedy in damages for any injury, however minor, that might conceivably be traced to the antitrust violation in issue. In short, the Plaintiff's proposed construction of the Minnesota antitrust law, carried to its logical conclusion, would provide the general public and/or general taxpayer standing to sue for most antitrust causes of action."

"In this case, the Plaintiff's proposed class is likely as large or larger than a class limited to Minnesota residents who pay property or income taxes."

"In this case, Plaintiff has only an abstract or tenuous connection to the subject matter of the case. Therefore, he lacks standing to sue for the injuries he

claims to have incurred."

Now, that's longer than I ordinarily would trouble the Court to read, but it seems to me that there is a particular reason why it is appropriate to read to the Court at that length from the Minnesota opinion. And that is that the Plaintiff's have in fact told your Honor that you ought to pay particular attention.

THE COURT: What page, Counsel?

MR. BOMSE: Page 12. There is pages eight and nine and pages 12 here. I'm reading, your Honor, Minnesota's antitrust statute, exactly like South Dakota's, grants standing to persons injured directly or indirectly by an antitrust violation. They then refer to this Philip Morris case which was referenced also by the Judge. Then to quote again, "because Philip Morris decisively rejects defendant's arguments, it must be considered in some detail." In other words, they are saying, take a look at the same statutory language, take a look at what Minnesota does. Well, we say, amen to that, but the decision that one, of course, needs to take a look at, we suggest, is the decision addressing a claim which is virtually identical brought by the same counsel and decided within the past few weeks.

It is also the case, your Honor, that South Dakota actually has a statute which urges the Court to construe

its laws in a way that is congruent with the laws of other states. Not only the federal law, but the laws of other states. It's 37-1-22. And Plaintiff's also, in their brief, again urge the same -- the same thing here at pages eight and nine. Decisions -- again quoting, "decisions from other state courts construing statutes with virtually identical language provide persuasive authority as to how South Dakota courts should interpret South Dakota's antitrust law and they quote there SDCL 37-1-22. It is the intent of the legislature that in construing this chapter, that the courts may use as a guide, interpretations given by state courts to comparable antitrust statutes.

I would say, your Honor, that in this case the comparable antitrust statutes, by their own terms, is Minnesota, but it also is New York which is a repealer state. Michigan, that's the Stark case, which has essentially identical language and is a case again brought allegedly essentially identical violations by the same counsel, and North Dakota. It is not merely that those courts have ruled in the way they have done, but the fact that their analysis, we believe, is correct, that together with the statute urging conformance, we would suggest, adds yet further support for the broad argument that we would make.

So, your Honor, we have tried to set out as carefully as we can and as clearly as we can why we think these cases can't go forward. I've tried today to summarize for the Court what our views are on that issue and while I'm, of course, happy to respond to questions that the Court has, at this point that would be our submission.

THE COURT: All right. The Court would like to hear from Ms. Crowley. Is there anything you want to add?

MS. CROWLEY: No, I have nothing to add. Thank you, your Honor.

THE COURT: All right. Counsel?

MR. MITBY: Thank you, your Honor. Steven Mitby on behalf of the -- on behalf of the Plaintiff.

Your Honor, this case is about South Dakota law not federal law, not New York law and not the law of any other state.

First, motions to dismiss are extremely disfavored under South Dakota law and are rarely granted unless this case is an extremely unusual case in which the pleadings alone demonstrate to your Honor that there is no way that the Plaintiffs could prove a cause of action, this Court should not consider dismissing these claims of the pleadings.

Secondly, by enacting one of the broadest antitrust remedial statutes in the United States, the South Dakota legislature explicitly rejected the very limitations on standing that the Defendants advance here. South Dakota Codified Law 37-1-33 states unequivocally, and I'm going to quote, "no provision of this chapter may deny any person who is injured directly or indirectly in his business or property by a violation of this chapter, the right to sue for and obtain any relief afforded under Section 37-1-14.3".

Now, under the expressed terms of this statute, Plaintiffs have an absolute right to bring this action in a South Dakota court because they were injured by defendant's anti-competitive conduct. Defendant's illegal tying arrangement caused injury to consumers by raising the price of consumer goods throughout and in fact, the defendants do not even deny that consumers made a portion of the fees that they charged to merchants and how could they? Whatever portion. Excessive fees merchants didn't absorb of your overhead, consumers might have paid in higher prices in this case. There are two groups of victims in the Defendants' anti-competitive conduct, consumers and merchants. Moreover, the injury to merchants is not speculative or remote. While merchants absolve and part of it, like 12 billion dollars

over the nation by out of pocket. No one, including the defendants, disputes that the consumers also paid a substantial share of those costs.

Now, in an effort to avoid the implication was South Dakota broad remedial and defendants are here seeking to draft the federal standing requirement under 37-1-33. Federal standing requirements are not appropriate for South Dakota law because they're based on an entirely different type of antitrust injury. Federal law doesn't recognize antitrust injury to indirect purchasers or anyone else besides those who bought directly from the defendant engaged in the illegal anti-competitive practice.

In this case, your Honor, the defendants ask this Court to adopt the Supreme Court's five factor test for antitrust standing which was articulated in the Associated General Contractors case. That case was decided ten years after the Supreme Court decided the Illinois Brick case and adopted the direct purchaser limitation. At the time Associated General Contractors was decided, the direct purchaser limitation was a feature federal antitrust law and standing requirements were crafted liberally in order to further the purposes of the federal antitrust statute which was to limit compensation to direct purchasers and avoid a series of

lawsuits by indirect purchasers who couldn't be compensated under substantive federal law anyway. And consistent with the Supreme Court standing, Juris Prudence in other areas, the Court adopted a test that quite logically focussed on whether the plaintiff had sustained a legally cognizable injury and was capable of recovering damages. That's the five factor test that the Supreme Court adopted and the Supreme Court encouraged lower courts in the federal system to consider factors such as whether the plaintiff is a consumer or a competitor in the restrained market, whether the injury alleged is direct firsthand impact of the restraint alleged, whether there were more directly injured plaintiffs with a motivation to sue and whether the plaintiffs claims would resist duplicative recoveries or compensation from damages. Precisely factors that prompted the Court in Illinois Brick to adopt the direct purchaser limitation in the first place, your Honor.

So the South Dakota legislature had an opportunity to consider these factors when it rejected the direct purchaser limitation and adopted Section 37-1-33 which gives anyone who has been injured by an antitrust violation the explicit right to sue.

THE COURT: What is the import of the last part of that statute "in any subsequent action arising from

the same conduct, the Court may take any steps necessary to avoid duplicative recovery against a defendant"?

MR. MITBY: Well, I think that is a logical outgrowth of the statute. It gives the Court the right to limit damages in some way or take some other measure in the context of an individual case to prevent a duplicative recovery and that makes sense. But what the South Dakota legislature rejected, and I think this second sentence of the statute proves it, is the idea that the risk of duplicative recovery should somehow be generalized that a standing requirement that applies to all cases.

The South Dakota legislature has vested this court and every other court in South Dakota with the duty of fashioning remedies in a particular case such as limitations on damages, such as some way of bringing together all of the potential plaintiffs into a single lawsuit as a way of avoiding duplicative recoveries. The legislature didn't authorize South Dakota courts to adopt general rules of standing that would preclude a recovery by an indirect purchaser simply because there is an inherent risk of duplicative recoveries.

So I think that the second sentence of that statute confirms the point that the Plaintiffs are trying to make in this case, which is that we -- we are entitled to a

case -- a decision in the context of this individual case about how best to reduce any potential risk of duplicative recoveries and I think, as this Court will recognize after discovery has been completed, the settlement that Defendants paid to the merchants as a result of the class action, the prior merchant class action, was only a tiny fraction of the damage that was actually caused in those cases and that is inconsistent with the purpose of the antitrust laws which is to provide for treble damages for violations of antitrust policy.

THE COURT: The parties chose to settle. We don't know what the damages would have been should the matter been tried.

MR. MITBY: That's correct, your Honor, but my point is that this Court would be entitled to give them settlement credit or find some other remedy to ensure that there is no duplicative recovery in this case. But South Dakota has rejected the notion that the risk of duplicative recovery should be incorporated into generalized standing requirements. The source that the federal system has adopted.

The standing test in Associated General Contractors is related to the types of injuries that are compensable under federal law and, of course, this makes sense

because the Supreme Court has explained again and again that a legally recognized injury is a fundamental requirement for standing. There is a series of decisions on this point and I have brought along one with me to show to the Court for illustrative purposes. May I approach, your Honor?

THE COURT: Yes.

MR. MITBY: This is a recent decision, Bennett versus Spear from the 1997 term of the Court. And if, your Honor, will look to the highlighted text, Justice Sclera wrote, "to satisfy the case or controversy requirement of Article III, a plaintiff must, generally speaking, and demonstrate that he has suffered injury in fact, that the injury is fairly traceable to the actions of the defendant and that the injury will likely be redressed by a favorable decision". There is language of this sort in a variety of decisions from the United States Supreme Court over the years addressing standing.

The point of this is that in the federal system courts adopt standing rules that further the goal of compensating plaintiffs who are entitled to be compensated and who can show an injury. Under federal law an indirect purchaser can't show that type of injury because that type of injury isn't recognized by federal antitrust laws. It would not make sense to take standing

requirements that have been developed for the sole purpose of trying to screen out folks that can't allege a legally recognized injury and import them into South Dakota law which has rejected the federal concept of injury allows indirect purchaser suits. In fact, goes so far to say that anyone injured by an antitrust violation has a right to sue for damages under South Dakota law.

The only factor in the federal test that is not explicitly related to whether the antitrust injury was direct or indirect, is whether the damages claims are speculative. And in this case the defendants have no basis at this very preliminary stage of the litigation for arguing that the damages claims are speculative because there has been no discovery, there has been no expert analysis. Plaintiffs haven't had an opportunity to come forward to this Court as in responding to a motion for summary judgment and show exactly what evidence we have adduced that demonstrates that these claims for damages are not speculative.

If, at some point down the road, defendants can convincingly argue to this Court that the damages claims are speculative, couldn't be proved with certainty, aren't entitled to compensation under South Dakota law, then this Court can and should revisit Battley (phonetic), but defendants aren't arguing that because

thus motion to dismiss and under South Dakota law the defendants can't attach any evidence or make any evidentiary arguments that are based on the facts of this case. They have to look solely to the pleadings.

I would submit that when counsel for Visa says that the damages claims in this case are speculative, he is relying on an assumption about what the evidence is going to show at a later stage and we, as Plaintiffs, have not had the opportunity to show to this Court what the evidence in fact proves. So we would like to -- we would like to save those arguments about whether this is -- this claim is speculative or not until both sides are in full possession of the facts.

Now, defendants, throughout their argument this morning, have offered no reason for this Court to disregard the plain language of Section 33-1-33. Defendants proposed limitation on standing would leave most of the injured parties in this case without any kind of remedy at all. And I submit that that result, your Honor, is plainly contrary to the legislature's purpose in enacting Section 37-1-33 and that purchase was to afford, quote, "any person", end of quote, injured by an antitrust violation, the right to sue regardless of whether the injury was direct or indirect. And under defendants rule, only the merchants could sue for

inflated prices paid to consumers as a result of an illegal tying arrangement. This approach would leave consumers who are, by far, the most populous group of the defendants antitrust victims without any kind of redress at all.

I want to respond briefly to a point that the defendants made when they said that that the overcharges are alleged to be spread over a wide variety of consumer goods and weren't really limited to people who were consumers in one imagination or another of Visa and Mastercard. I think that that argument really proves too much. It would leave consumers in this case without a remedy precisely because of the manner in which the defendants chose to implement their tying ring. In particular, Visa and Mastercard specifically prohibit merchants from assessing on a debit card transaction a fee directly to the debit card user. Under Visa's own rules merchants are required to spread whatever portion of that cost that they don't absorb in that overhead on to all consumers. They can't just target pick debit card users. Presumably not very many people would use the Visa debit card. This puts defendants in the position of being able to adopt policies that automatically deny most of their victims standing to sue and thus any possibility of compensation and this lesson will not be lost on

future antitrust violaters. It will almost certainly endeavor to structure their conduct as to take advantage of any judicially created bars to recover. Given the South Dakota legislature's unambiguous mandate in favor of broad antitrust remedies, this outcome would be unaccepted.

The defendants have also claimed that the Plaintiff's injuries are somehow derivative or remote. This is wrong for several reasons. First, no one disputes that South Dakota law provides a remedy for an indirect purchasers injury. Counsel for Visa has conceded this afternoon, and I don't think there is anyone that would attempt to read that type of provision out of the statute, but in this case the injury to consumers, is actually a lot less derivative or remote than the injuries for indirect purchasers have recovered in other cases.

In this case, remember, your Honor, that there are only two groups of people who are potential plaintiffs and potential victims of this tying arrangement, merchants and consumers. There is no long supply chain. There is no long, long distribution chain. There is no passing through these charges through a series of middle man. There is two groups of merchants and consumers and the defendants would concede, I suspect, that indirect

purchaser cases where a good is sold to one purchaser who passes it onto another who passes that onto a third and even onto a fourth, that more than just the first indirect purchaser would be entitled to recover. There are several case that address the very issue we have cited, some of them unbriefed and in the Holder versus Archer Daniels Midland case where numerous indirect purchasers of citric acid and other ingredients in food products brought suit against Archer Daniels Midland for price fixes and Archer Midland's principle argument, look, these people don't have standing to sue. They didn't buy citric acid, they bought orange juice and that citric acid passed through a series of transformations in the factory, passed through a series of distributers. How can these purchasers even begin to tell us how much they were overcharged because of illegal price fixing conspiracy? Well, this case is really not much different than that except the difference is overcharges were passed directly to the consumers by the merchants. They didn't pass through the middle man. There was no change of the product or repeated changing of hands in this transaction. The merchants decided, after they saw the bill from Visa, how much they were going to raise their prices on all consumer goods in order to compensate them for some of that increased cost.

This is also not like some daisy chain of causation where the telephone company is fix pricing and suddenly everybody who buys anything is a victim of a vast antitrust conspiracy because everybody is using -- because every merchant in the world uses a telephone. That's not the case at all. In this case, again, the charge is passed on directly to consumers. There is just one middle man, that's the merchant, and the plaintiffs are entitled to try to prove that there is a specific amount by which they were injured in each of these cases. And the -- I think this Court should consider, you know, revisiting the issue of speculativeness after there are some facts on the table by which the plaintiffs can try to show exactly what types of injuries they sustained and how much.

I'd like to address next the defendants' reliance on case law from states with narrower remedial statutes than South Dakota's. I have to confess that I have not seen a copy of the Minnesota decision. It wasn't sent to me. I don't have one in front of me. I would be happy to comment on it at greater length for this Court after having a chance to review what the Minnesota Appellate Court in this case actually said. But I would submit initially that the Minnesota case is a decision that has not passed through appellate review including review by

the Supreme Court of Minnesota and this Court should pay special attention to what the Supreme Court of Minnesota says the law says because the Supreme Court of Minnesota, reading the same type of statute, has interpreted it very broadly as they did in the Blue Cross Blue Shield case. Keep in mind that Blue Cross Blue Shield was suing tobacco companies for driving up health care costs even though I don't think anyone would argue that Blue Cross Blue Shield was, in some sense, was a consumer that bought products from the tobacco companies. So the Minnesota Supreme Court needs a chance to be heard on whether this decision is consistent with Minnesota law before this Court assumes that Minnesota law would reject these claims.

Secondly, plaintiffs rely on decisions from New York and North Dakota. Well, New York and North Dakota do not have statutes that are anything like Section 37-1-33. In fact, if I may approach, your Honor, I brought a handout for the Court that compares the language of the North Dakota and New York statutes with the language of the South Dakota statute. May I approach, your Honor?

THE COURT: Do you have a copy for counsel?

MR. MITBY: Yes, I do. Thank you, your Honor. As your Honor will note, Section 5108.1 -- 08 and in any tax for damages under this section, the fact that the

state said, "a person threatened with injury or injured in its business or property by any violation of the provisions of this chapter has not dealt directly with the defendant does not bar recovery". And looking to the language of New York general business law section 340 subsection six, the state uses similar language. It says, "the fact that the plaintiff hasn't dealt directly with the defendant, doesn't bar recovery". That's very different from saying that any person injured by an antitrust violation has the right to sue. These statutes tell courts what fact they can't use as a way of denying recovery all together. The South Dakota law is an affirmative grant of the right to sue and implicitly of standing to sue for any type of antitrust violation.

Now, defendants also point to the Michigan statute which is approximately the same as the South Dakota statute, however what defendants failed to note is that Michigan courts have interpreted the rights of indirect purchasers much more narrowly than South Dakota courts. And I would refer your Honor to page 679 of the Microsoft antitrust litigation opinion which was from the South Dakota Supreme Court. It's cited actually by the defendants in their brief. And when you look at what the South Dakota Supreme Court has to say about Michigan law, first the Supreme Court noted that Michigan was one of

only two states in the country that allowed indirect purchaser suits, but actually refused to permit indirect purchasers to participate in antitrust class actions. So the Michigan Supreme Court -- or the South Dakota Supreme Court first noted that Michigan is an out liar in giving a narrow reading to its antitrust remedies provision and then it refused to follow Michigan's interpretation of that statute finding that it's interpretation was too narrow.

So I would submit, your Honor, that Michigan and South Dakota, even faced with the same type of statute, have taken different paths. The South Dakota Supreme Court is likely to give full effect to the broad remedial provision that the legislature enacted. Thus none of the defendants' authorities really address the fundamental difference in this case between South Dakota law and the law of the states on which they place their reliance.

I'd like to close by noting that, you know, defendants have not argued that there are no standing requirements at all in South Dakota law. That's a false choice. First of all, plaintiffs have to be able to show that they sustained an injury for which they can show damages and at some point in this litigation, after some evidence has been presented, this Court will have to determine whether defendants have presented a genuine

law which has an entirely different policy and entirely different scope and that effort should be rejected by this Court because it's inconsistent with the will of the South Dakota legislature. Thank you, your Honor.

THE COURT: All right. We'll take a short recess and then I'll hear your response.

MR. BOMSE: Thank you, your Honor.

(Whereupon, a recess was taken.)

THE COURT: All right. Mr. Bomse.

MR. BOMSE: Thank you, your Honor. It seemed to me trying to put Mr. -- put this argument together, we are kind of following progression. The first is that there are no standing requirements. Second, Associated General Contractors is really just Illinois Brick. Third, we don't --

THE COURT: Would you repeat that, please?

MR. BOMSE: Yes. The second is that the Associated General Contractors is just Illinois Brick. It's the same considerations and the same analysis.

THE COURT: Well, if the South Dakota legislature, in drafting 37-1-33, is attempting to use an Illinois Brick repealer, what does that do to the standing factors set out in the contractor's case?

MR. BOMSE: It says that you have to interpret Associated General Contractors in light of that and

that's --

THE COURT: What does that mean, which survive?

MR. BOMSE: Very simple. The first factor needs to be modified. That is, the first factor is whether somebody is a competitor or a consumer. That factor means that you have to have somebody who is someone somewhere in the chain of defendants distribution. That is, you can't -- you can't simply have an interpretation which does away with what the South Dakota legislature does any more than you can simply interpret what the South Dakota legislature did as doing away with all antitrust standing requirements. So, what you do is you look to the defendants chain of distribution. And the problem here is that the plaintiffs don't satisfy that. They are not somewhere in the defendant's chain of distribution.

Now, where do I get that? Well, I get that from the statute -- from the notion that we want to reject Illinois Brick. But I get it somewhere else. I get it from Justice Brennan's dissent. What you were told when we finally got to the fourth step in plaintiff's argument on page 20 of their brief where the heading is "standing under South Dakota's antitrust law should be determined according to the target area test from Justice Brennan's dissent in Illinois Brick". If you go to Justice

Brennan's dissent in Illinois Brick, this is what you find. You find Justice Brennan saying, "I concede that despite the broad wording of Section 4, there is a point beyond which the wrongdoer should not be held liable". This is on pages 760 and 761 of that opinion. And then he goes down in the paragraph and he says, "but if the broad language of Section 4 means anything, surely it must render the defendant liable to those within the defendant's chain of distribution". That is, if you have an indirect purchaser who bought a product further down the chain or although I think this is less clear, you have somebody who bought a product that contains an ingredient, their vitamin example or the Microsoft example, where the operating system gets incorporated into a computer that is purchased by a consumer, you would meet the South Dakota test, at least that part of it. But where you have just what we have called an overhead suit. That is something that just says because the costs of doing business are increased, everybody can sue for anything, then you're way outside.

THE COURT: So you submit that the first factor of Associated Contractors survives and Illinois Brick is a repealer?

MR. BOMSE: I suggested it survives in the modified format indicated, yes. Yes.

THE COURT: What about the remaining factors?

MR. BOMSE: The second factor is about whether injury is direct or derivative. The Court in Associated General Contractors used the term indirect. But if you go to that portion of the opinion, you'll see that they didn't cite Illinois Brick. They weren't invoking the Illinois Brick part. What they were talking about was injury that is derivative. Injury that has some intervening cause. And if you understand it in the way that the Supreme Court actually is talking about it, as opposed to turning into it into a simple slogan, then that phrase applies -- that part of the test applies as well.

The third factor is, is there somebody else more directly injured? It seems to me that the -- that is what the Court in Minnesota suggested. It's hard to apply that factor literally here. Although let me have a caveat to that. Because the factor actually is there is somebody more directly injured with a motivation to sue. What they're really saying is, do we have a trouble of antitrust violation perhaps not being pursued by anybody and if you take Microsoft as an example, in Microsoft, the indirect purchaser suits. The consumer suits tended to be the only ones that were brought at least initially. So in that case somebody could argue, under South Dakota

law, we would meet the third -- the third factor.

Then when you get to the fourth factor, and at some point I'm gonna outrun my memory, but we are concerned with speculativeness of damages and I would suggest to the Court that that factor absolutely was intended still to apply.

THE COURT: All right. Now, does 37-1-33, which refers to the duplicative recovery which is the fifth factor. What is the South Dakota legislature -- the fifth factor under Associated General Contractors is whether the claim risk duplicative recovery. What is the South Dakota legislature intended by the last sentence of 37-1-33 when they indicate that the Court may take any steps necessary to avoid duplicative recovery against a defendant?

MR. BOMSE: Well, I could -- I could be very aggressive in my reading of that and say that the South Dakota legislature intended not to allow this kind of a suit where there already has been an earlier suit with a recovery. But I don't think that's right. I think that would be an overreading on my part. Now, I don't have legislative history here which answers that question either way, but I don't want to over argue this because I'm telling you that I think we have to have an appropriate reading one way, so I'm not gonna tell you

that this was meant to take away this case as a matter of law. We didn't argue that in our papers. I think what it was reflecting was a clear sensitivity to it. It is plainly reflecting the notion that somewhere down the line, if this case were to go forward, we would need to deal with that, whether it means we're gonna bring in all of the merchants in South Dakota and seek indemnity from them.

THE COURT: Is factor affecting standing?

MR. BOMSE: I don't think it's factor... I don't think it's a factor here affecting standing, but I certainly think that it is a factor that is pertinent -- I think I'm not -- I think I didn't articulate that correctly. I don't think that this clause that you read has to do with standing. I do think that duplicative recovery does have to do with standing. That is, it is something you are expected to take into account. Remember, Associated General Contractors, your Honor, if you look at the opinion, the Court is very clear about this. It's saying, look, we can't just give all federal courts a checklist of things to go down in every case and if you hit three out of five, you lose. If you only hit one out of five you win. They said that's not the way you do this. You have to look at the overall situation in light of these factors and you have to make a

judgment.

THE COURT: Are you urging the Court to find that the action will result in a duplicative recovery?

MR. BOMSE: Absolutely.

THE COURT: And therefore should bar standing?

MR. BOMSE: I'm asking the Court to find that because of the clear potential for duplicative recovery, there is less need for this kind of litigation and that is something that ought to be part of the Court's calculus. It is not sufficient standing alone, no pun intended, to bar standing. But it certainly is something that plainly was intended to be taken into account and the legislature made that clear.

All we're suggesting, your Honor, is that it is clear enough that standing requirements are not simply subsumed by Illinois Brick or by an Illinois Brick repealer. They are not the same thing. If you go back to footnote seven in Illinois Brick, the Court has a long discussion there about the relationship between standing on one hand and Illinois Brick on the other. And that's where the phrase analytically distinct comes from.

In fact, in that case, the Court recites the history in footnote seven. In that case, the defendants had actually won on standing grounds in the lower court, but then the Supreme Court chose, after it granted the cert,

not to go off on generalized standing, but to in fact adopt the policy based response, the corollary to Hanover Shoe, and say we're not going to allow any indirect purchaser suits. That's a bright line test.

As counsel pointed out to you, it was about seven years later when the Court got to the generalized question of standing in Associated General Contractors. Illinois Brick was already on the books. And it then went through those factors because it said and the Court there in Associated General Contractors, started out with actually the same kind of observation that you heard from Mr. Mitby. That's with the observation that a literal reading of the statute is broad enough to encompass every harm that can be attributed directly to or indirectly to the consequences of an antitrust violation.

And the Court then proceeded, of course, to reject that. It did it by going through and I was -- I'm starting here on pages 529 and 530. But if you then start there and go through the next several pages, you will see the Supreme Court, going through a very elaborate analysis of limitations on similarly broad statutes, saying you can't mean what that says. You have to have some limitations. And it goes through the variety of limitations that were applied at common law in both tort and contract actions and it does it actually

for several pages. It's not something we kind of throw off. And that was then the preclude to their discussion of standing factors. And as we say, the courts have been fairly resolute and the Illinois Brick repealer states in still, saying, yeah, we have to have standing limitations because otherwise you get into certain situations that really don't make any sense and in some ways if you allow, as the Minnesota court concluded, a case this broad, what do you really have? You have, as I said, these overhead cases with damages, to use its word, "inherently and hopelessly speculative".

I mean, on our way to lunch today we were talking about the telephone example, Mr. LeBrun and I, and he observed that under this theory of standing and the telephone case really isn't, with all respect to Mr. Mitby, any different in terms of it's breath or in terms of the number of layers. You have a situation in which the telephone company overcharges a business, a law firm. A law firm raises its rates to its clients. The clients, a restaurant, then serves food to a consumer and the consumer says I paid an overcharge somewhere in that because it would be passed down along that chain. I mean, if one wants to really say that that is it because of the words of the statute, I think you have done a disservice to what the South Dakota legislature actually

had in mind in these cases. I think that granting our motion to dismiss here is not in any way going to cause harm to the intent of the legislature and to appropriate indirect purchaser cases.

I think on the other hand, opening up this kind of an overhead case will do that kind of harm. And I think that the standing rules exist for the purpose of preventing that from happening and they do have an independent life independent of Illinois Brick.

The argument here, you know, it isn't like standing somehow was invented after or at the time of Illinois Brick. We have had standing rules in antitrust cases both federal and state going well back into the beginning of the Sherman Act. One of the most famous cases Hawaii against -- Hawaiian Standard Oils in 1972 and many other standing cases before that.

What they are suggesting to you is that somehow when the State of South Dakota responded to Illinois Brick by saying we're gonna allow indirect purchaser claims; that they somehow silently intended to wipe out that whole body of law and I think that's just a heroic and unjustified reading which will have mischief and, you know, I don't know if I'm being persuasive to this Court, but I have been persuasive in other courts because I think that when you do think, and I tried to listen

carefully, and the one thing that I didn't hear, other than the conclusions about how this isn't speculative and it isn't something that we can decide now, I didn't hear a response to how you deal with what is manifest on the face of this complaint.

My example about the Saturday morning errands or my discussion of overhead or the fact that you are simply opening the doors to claims that we don't need to have further procedures in order to determine that they're inherently and hopefully less speculative or as the Court in New York said, "the complexity and speculative nature are overwhelming" or as Michigan said, "the claims are speculative and would be incredibly complex". I respectfully submit, your Honor, that it stands there on the face of this -- of this complaint. Standing cases are resolved with all respect at the pleading stage. That's almost always the way they are resolved because we can cut them off that way. We're not asking you to deny the allegations of the complaint, we're asking you to accept them and to say accepting them, but accepting them without leaving our common sense at the door. We can figure out what it is you're asking us to do here and we're gonna say that this simply goes -- goes too far.

Now, you know, I have some very specific things I could tell your Honor about what plaintiffs have to say.

For example, their reference to Article III standing in the case that they gave you. I was -- I was puzzled, since most of us know who do antitrust, that Article III standing and antitrust standing are two different animals. And if you need to have a cite for that, it happens that the Court said it in Associated General Contractors in footnote 31 where they talk about the fact that the two things are different. I mean, it talks about court antitrust cases needing to make a further determination whether the plaintiff is a proper party to bring a private antitrust action so it isn't just Article III standing.

The other piece of paper that we were all handed about the difference between New York and North Dakota antitrust laws versus South Dakota. I would say that while the words may not be identical, the meaning is identical and, of course, that leaves Michigan and Minnesota unaddressed at all including the assertions made in the briefs that were submitted by the plaintiffs' firm here about how the Minnesota statute is identical and interpretations are particularly important.

I think I have dealt with the target area issue in the sense of explaining to you exactly what it was they're arguing, the Justice Brennan test and referring you to what he had to say what that means. I mean, their

own recognition that there needs to be some test, says that even they can't bring themselves at the end of the day to really argue that there should be no standing limits. What they want you to do is instead to accept a test that has been rejected and reject a test which has been accepted, but when we look at the test that they offer you, it is a test that were in fact -- that they don't meet. That is, Justice Brennan, in the chain of distribution. These people who are not in the chain of distribution don't even have to have a debit card. They're not indirect purchasers. They're not purchasers of a product with ingredients. They are simply people who purchased something that's supposedly went up in cost because instead of telephone service or janitorial services or rent being increased, debit card fees were increased and that brings us back to whereas the Minnesota court, we think, correctly concluded, you have no limits at all. We don't think that makes sense.

THE COURT: Mr. Mitby, do you want to respond?

MR. MITBY: Thank you, your Honor. We're not arguing for no limits at all. There are limits. The limits are that you have a cognizable antitrust injury that the Plaintiffs have done in this case. It is not a situation where some law firm was passing a minute charge from on a telephone bill to its customers. This is a

situation where the debit card fees are in the order of 1.5 percent or a little bit less on every hundred dollars spent using a debit card. That's a lot of money. That's why we have alleged that the actual damages in this case exceed 12 billion dollars, treble would be 36 billion potentially and that's why we believe that consumers in South Dakota bore a significant part of this overcharge. It's not a daisy chain of causation. In this case there are two injured parts here, merchants and consumers. Whatever portion of these illegal overcharges, the merchants did not absorb in their overhead, consumers had to pay out of pocket. Consumers under South Dakota law have standing to sue because Section 37-1-33 grants standing to any party who has been injured by an antitrust violation and the courts across the country have dealt with consumer class actions in the antitrust context and outside the antitrust context. It's not a case that the complexities in this instance are so overwhelming that we should disregard the plain language of the South Dakota legislature and decide to ignore the South Dakota legislature's rejection of the very standard that the defendants advocate here and then simply allow these claims to go without any compensation at all. Should the defendants just get away with this? Should the defendants be allowed to get away with illegal

antitrust activity simply because they adopted rules that require merchants to plead the costs? These illegal arrangements controls all goods instead of simply charge the debit customers on those goods, that would allow defendants to profit from their own ability to implement this illegal scheme in a particular way. And this Court shouldn't allow that. That's gonna allow every defendant to structure its conduct so that it can come into court, as the defendants are doing today, and argue that the very victims of their illegal practices don't have standing or fail for some other reason under the antitrust laws.

Now, I like to address the point that Mr. Bomse made regarding the so-called analytical distinction between standing requirements and the concept of a legal injury question. The two injuries may be analytically distinct, but as a practical matter, they're related. That's why five out of five of the factors are articulated in Associated General Contractors relate to whether the plaintiff had suffered a cognizable injury under federal law, i.e. was a direct purchaser, and whether the plaintiff was in a position to recover damages for that. And I've given you one example of a standing case in the Article III context where the Court explained the relationship between substantive injury and standing, but

could I give you examples from other contexts as well? I don't think -- and I think perhaps the best example is Associated General Contractors, itself, where the standing factors that the Supreme Court asked courts to consider when evaluating standing are based on the same set of factors that it used in Illinois Brick to adopt the direct purchaser rule. The point is that if a standing requirement is based on the notion that only direct purchasers are ever gonna be entitled to recover for an antitrust injury and so therefore we ought not to hear claims from people who don't allege that they are in fact direct purchasers, we can't import that concept into South Dakota law because, your Honor, if we import that concept into South Dakota law, we'll be overriding what the legislature intended which is for anyone injured by antitrust violations to be able to recover not just direct purchasers, as the US Supreme Court has said.

THE COURT: What assumption can you draw about the repealer? Are you assuming that the repealer goes beyond the mere holding of Illinois Brick?

MR. MITBY: Yes, your Honor, I am assuming that because the repealer is broader than repealers adopted by other states. We seen two examples, North Dakota and New York. Those repealers are not substantively identical as the defendants claim. What they say is that a Court

can't use the fact that the plaintiff didn't have a direct relationship with the antitrust violater. In other words, won't in privity.

I believe that the language from the statute is dealt directly. You can't use the fact that the plaintiff didn't deal directly with the defendant to bar recovery. That's different from saying that anyone who suffers an injury and I'll just quote the statute from the beginning again. The statute says "no provision of this chapter may deny any person who is injured directly or indirectly in his business or property, by a violation of this chapter, the right to sue for and obtain any relief afforded under 37-1-14-3". That's different from saying simply that's the fact and I quote, "the fact that the state political subdivision, public agency or person threatened with injury or injured in its business or property by any violation of the provisions of this chapter, has not dealt directly with the defendant, does not bar recovery". In other words, in North Dakota and New York other factors might bar recovery even from someone who has a bona fide antitrust injury. In South Dakota the legislature has said that that approach is wrong and is not gonna be the policy of this state.

I'd like to call your Honor's attention to the second part of 37-1-33 which allows this Court to take

measures necessary to prevent duplicative recoveries. I notice from your Honor's questions that your Honor is wondering about the relationship between those two provisions and contrary to what the defendants are saying, I submit to you that that second part of the statute basically says the legislature says we recognize the concerns about duplicative recoveries, but we don't want to simply bar indirect purchaser suits all together whether on standing grounds or injury grounds. We want courts to deal with this on a case-by-case basis and we want courts to use the many tools that are available from joinder to class action devices to settlement credits to some kind of jury instruction reducing the amount of damages in an appropriate case. We want courts to make this decision on a case-by-case basis, not a Supreme Court to incorporate the concern about duplicative recoveries into a bar to standing which is one of the things that the -- which is the approach that federal law has taken. South Dakota's rejected that approach and it has instead asked courts to do the work in an individual case of deciding how to minimize the risk of duplicative recoveries rather than trying to generalize that issue into a bar to standing that would leave some people uncompensated.

In this case, we have conduct that, according to the

allegations in this complaint, I don't even think the defendants are disputing this part of it. That Mastercard and Visa don't allow their merchant subscribers to pass on the charges of these debit transactions to debit customers. They have to spread them across the cost of goods generally or else they get thrown out of the Mastercard/Visa system. Now, should Mastercard and Visa be entitled to profit from an illegal tying arrangement that has this feature by being able to bar consumers at the courthouse door, I think not. And I think that -- I submit to you, your Honor, that the South Dakota legislature has said that anyone who suffers an antitrust injury is entitled to sue for damages and these consumers are entitled to sue. Thank you.

MR. BOMSE: Your Honor, may I, as moving party, in closing in less than a minute, I believe.

THE COURT: You may.

MR. BOMSE: First of all, may I respectfully rise to the challenge that was made. It isn't in the motion you would have to justify the proceedings, maybe it's entirely incorrect in his statement about our rules. If the Court had any question about that, we could submit the rule which does allow a differential in pricing, but I don't think it's here nor there. I just don't want to let that misstatement go uncorrected, particularly when

it's suggested we concede that that is the situation. But as I say, that is neither here nor there.

It seems to us, and this is the only point I want to make, that Plaintiffs have really put to the Court a challenge. That is to conclude that the legislature silently intended to do more than repeal Illinois Brick, when I think it's quite clear from the legislative history here, as everywhere else, that it was an Illinois Brick repealer statute. The timing all came about, it would have been an easy enough thing for the legislature to say that we intend to eliminate standing requirements. So I think that they are in fact asking your Honor to go beyond where the legislature actually chose to go.

I would observe, your Honor, that if you go back to the federal statute, itself, that was at issue in AGC. It is every bit as broad in its terms as the statute in South Dakota. Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefore that's the statute that the Court -- the Supreme Court voted in AGC just before it talked about how a literal reading of the statute is broad enough to encompass any harm that can be contributed to directly or indirectly to the consequence of a antitrust violation. So we have -- this Court has the same issue in front of it that the Court had -- the

United States Supreme Court, that is the AGC case, that is what to make of this language and both sides have suggested to you what we think you should make of it.

THE COURT: All right. Thank you. Counsel, the Court has considered the numerous authorities that you have presented and the briefs you have submitted as well as the at least an hour and a half of oral argument. The Court in this case grants the motion to dismiss. The Court relies on significant portions of Associated General Contractors in applying several of the factors, specifically factors one and five. The Court finds that the Plaintiffs lack standing as they are not alleging injury as consumers in the relevant market. Debit card services that the antitrust law would seek to protect and since the class of merchants has already recovered a judgment, this suit would only threaten to duplicate the recovery.

So the Court relies on factor one in Associated General Contractor and factor five in making its determination that the plaintiffs lack standing in this case.

Again, the plaintiffs are not participants in the relative market affected by the anti-competitive conduct and further that the merchants have already recovered and that there is a significant and real risk of duplicative

recovery.

The Court assumes that there may be an appeal brought to the South Dakota Supreme Court from this Court's ruling and the Court thanks you for the effort that you have put into preparing both of your arguments. They were very well prepared and well argued.

You are directed to prepare an order for dismissal on behalf of Visa and Mastercard, Mr. Bomse to submit it to Mr. Mitby for his review prior to submission to the Court.

With that, we're adjourned.

(End of proceedings.)

STATE OF SOUTH DAKOTA)
) ss. CERTIFICATE
COUNTY OF PENNINGTON)

I, Jean A. Kappedal, RPR, Official Court Reporter of the Seventh Judicial Circuit and Notary Public within and for the State of South Dakota, do hereby certify that the testimony of the proceedings that came on for hearing in the aforecaptioned matter, contained on the foregoing pages, 1 - 55, inclusive, was reduced to stenographic writing by me and hereafter caused to be transcribed; that said testimony commenced on the 28th day of September, 2004, in the Courtroom of the Pennington County Courthouse, Rapid City, South Dakota; and the foregoing is a full, true and complete transcript of my shorthand notes of the proceedings had at the time and place above set forth.

Dated this 22nd day of October, 2004.

COPY

Jean A. Kappedal, RPR
My Commission Expires: 2/13/10